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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 41

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE W. WYLIE,
STUART B. WARREN,
St. Petersburg, Florida,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Standard Accident Insurance Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals #8327, entered on April 14, 1937 (R. 36), affirming a certain judgment of the United States District Court for the Southern District of Florida (Civil 3420-T) (R. 25, 26).

Summary Statement of the Matter Involved.

Your petitioner is the surety on a postoffice construction bond given pursuant to Act of August 13, 1894, 28 Statutes

278 and amendments thereto, Title 40 U. S. C. A., Section 270 (repealed with a saving clause and a similar statute, with applicable language substituted therefor, Act August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A., 40 Section 270a). (See appendix.)

Respondent is a carrier, which, having transported materials used in the work, sued upon the bond for its unpaid freight bills. (Declaration, R. 2, 3, 4, 5, 6, 7.)

Petitioner's demurrer (R. 24) that a railroad company as to freight charges, is not within the meaning of the bond, "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work" was overruled, and the facts being admitted, judgment went for the respondent in the District Court (R. 25, 26).

From that judgment, appeal was taken by the petitioner to the United States Circuit Court of Appeals for the Fifth Circuit (R. 28), which, after hearing, affirmed the judgment of the United States District Court (R. 36) (case not yet reported).

A stay of mandate was entered on the application of appellant (R. 37-38). The only error assigned in the Circuit Court of Appeals in support of petitioner's appeal, questioned the ruling of the lower court in its decision that freight charges were within the meaning of the bond "a corporation which furnished labor or materials used in the construction or repair of any public building or public work".

The United States Circuit Court of Appeals affirmed the judgment of the lower court, adopting the rule of broad and liberal construction of the statute and bond (R. 34-36) (not yet reported).

THE CONTENTION OF YOUR PETITIONER IS THAT THE RULING OF THE U. S. CIRCUIT COURT

OF APPEALS OF THE FIFTH CIRCUIT THAT FREIGHT CHARGES INCURRED BY A CONTRACTOR IN THE PROSECUTION OF A UNITED STATES GOVERNMENT CONTRACT, DO COME WITHIN THE TERMS OF A SURETY BOND CONDITIONED TO "MAKE PAYMENTS TO ALL PERSONS SUPPLYING THE PRINCIPAL WITH LABOR AND MATERIALS IN THE PROSECUTION OF THE WORK", IS IN CONFLICT WITH THE RULING OF THE CIRCUIT COURT OF APPEALS IN THE THIRD AND NINTH CIRCUITS.

Reasons Relied on for Allowance of the Writ.

The decision of the United States Circuit Court for the Fifth Circuit in the instant case and in former cases, is in direct conflict with the decisions of the Circuit Court of Appeals in the Ninth Circuit in the case of *Title Guaranty and Trust Company* v. *Puget Sound Engineer Works,* 163 Fed. Rep. 168, and in direct conflict with a decision of the United States Circuit Court of Appeals of the Third Circuit in the case of *Mandel* v. *United States,* 4 F. (2d) 629, in which said cases a claim for the allowance of freight bills, under an exactly similar bond, was denied.

WHEREFORE your petitioner respectfully prays that this petition for writ of certiorari, to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, be granted.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
By GEORGE W. WYLIE,
Attorney, St. Petersburg, Florida;
GEORGE W. WYLIE,
STUART B. WARREN,
Solicitors, St. Petersburg, Florida.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFITS OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

There was no official written opinion by the District Court Judge. His action in granting the judgment is set forth in the record (R. 25). The opinion of the Circuit Court of Appeals (R. 34-36) is not yet officially reported.

II.

Jurisdiction.

1. The Statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240a, as

amended by the Act of February 13, 1925, 43 Statutes 938 (U. S. C. Title 28, Sec. 347a).

2. The order of the Circuit Court of Appeals, review of which is sought, was entered on April 14, 1937 (R. 36) (decision not yet reported).

Section 240a of the Judicial Code, as amended, clearly confers jurisdiction upon this Court to bring up a case of this character from the Circuit Court of Appeals by certiorari and sub-paragraph (b) of paragraph 5 of Rule 38 of this Court clearly recognizes such right.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and, in the interests of brevity, are not repeated here.

IV.

Specifications of Error.

It is respectfully submitted that the Circuit Court of Appeals erred in affirming the judgment of the District Court.

V.

ARGUMENT.

IT IS OUR CONTENTION THAT THE RULING OF THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT, THAT FREIGHT CHARGES INCURRED BY A CONTRACTOR IN THE PROSECUTION OF A UNITED STATES GOVERNMENT CONTRACT, DO COME WITHIN THE TERMS OF A SURETY BOND CONDITIONED TO "MAKE PAYMENTS TO ALL PERSONS SUPPLYING THE

PRINCIPAL WITH LABOR AND MATERIALS IN THE PROSECUTION OF THE WORK," IS IN CONFLICT WITH THE RULING OF THE CIRCUIT COURTS OF APPEALS IN THE THIRD AND NINTH CIRCUITS.

The Circuit Court of Appeals of the Fifth Circuit, in the instant case, held that a railroad company, as to freight charges, was within the meaning of the bond "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work."

Circuit Judge Hutcheson said in the opinion:

> "Appellee insists that except for our decision in City of Stuart *vs.* American Surety Co. 38 Fed. (2nd) 195, both reason and authority support its claim that the carrier furnished neither labor nor materials to the work. It urges us to re-examine that case, and either disapprove its holding or confine its effect to a bond worded literally and precisely as that one was. It urges upon us, in short, a return to our earlier decision, United States *vs.* Hyatt, 92 Fed. 442, which the Stuart case, though not expressly, has impliedly overruled.
>
> " * * * It will serve no purpose for us to thresh again this old straw. It is sufficient for us to say that we disapprove the ruling and teaching of the Hyatt case. We approved that in City of Stuart."

The same Circuit Court, in the case of City of *Stuart* v. *American Surety Company,* 38 F. (2d) 195, made a similar ruling, and speaking through Circuit Judge Sibley said:

> "Railroad transportation of materials combines the furnishing of work, skill and machinery for the purpose of the contract, even if not labor in the narrow sense originally attributed to the word in the Hyatt case."

These rulings of the Fifth Circuit are directly in conflict with the rulings of the Circuit Court of Appeals for the

Third Circuit in *Mandel* v. *United States*, 4 F. (2d) 629, which case held that under a similar bond, claims of carriers for freight charges did not come within the terms of the statute and bond.

In its opinion, the court said:

> "* * * The words 'labor and material' used by Congress in this statute, are plain words of well understood meaning, and in the common use and acceptance, car demurrage and car freight are not described or embraced by the words 'labor and material'. Moreover, there is no call for the exercise of judicial construction to give to demurrage and freight the protection of this statutory bond.
>
> "* * * We agree with what was said in U. S. *v.* Hyatt, 92 Fed. 445, 34 C. C. A. 447: 'Congress could not have intended to include in the term 'labor' as used in this act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight * * *. But conceding this exceptional situation, where the railroad could not enforce its lien—a situation it knew existed—that is no reason why the statute should be given a construction different from what we have seen was its real and proper one."

The ruling of the Fifth Circuit is also in direct conflict with the ruling of the Ninth Circuit in *Title Guaranty and Trust Company* v. *Puget Sound Engine Works*, 163 Fed. 168; 89 C. C. A. 618, in which the Court ruled that freight advanced by a transfer company was not recoverable under a similar bond. In that case, the Court said:

> "We cannot approve, though, of the claim of the Eyres Company for freight money advanced to the carriers and added to the cartage bill."

In view of the ruling of the Court in the *City of Stuart* case (*supra*), and the emphatic language used in the instant

case, petitioner did not file a petition for a rehearing, deeming that such course would avail it nothing.

VI.

Conclusion.

We respectfully submit that the final determination by this Court of the law involved is of the utmost importance to the rights of sureties and common carriers under the bond required to be given in construction and repair of public buildings and works and is of particular importance because of the many building and construction projects being undertaken by the political subdivisions of the various cities.

This question is present in a large number of cases and will involve considerable moneys; that the ruling of the Fifth Circuit is contrary to the law as announced by it in its earlier decisions and is contrary to the ruling in two of the other circuits. That the Statute now in force, being Act of August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 270a, Title 40, uses the same applicable language as the statute which has been repealed and which is in controversy here. (See appendix.)

It is a matter of importance, both to surety companies and the carriers who do a nationwide business, that they be apprised of their rights and liabilities; that their rights may be the same regardless of where the cause of action arises, or is attempted to be enforced, and that their rights not be dependent upon the particular circuit in which they arise or are sought to be enforced.

Unless the conflict be corrected, the effect will be to create irreparable confusion regarding the question, not only in those circuits in which the question has been passed upon, but in those in which it has not.

We respectfully submit, for the reasons stated in the petition and this brief, that application for writ of certiorari should be granted.

GEORGE W. WYLIE,
STUART B. WARREN,
Counsel for Petitioner,
St. Petersburg, Florida.

APPENDIX.

Acts August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40, Sec. 270a.

"SEC. 270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor".

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000, the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he

finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, Sec. 1, 49 Stat. 793.)